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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In Re: USAir, Inc.

ON PETITION FOR WRIT OF PROHIBITION
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA

MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

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The Air Transport Association of America ("ATA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case.

The ATA has notified all other parties to this action and has received the following responses to its request for consent to file this brief *amicus curiae*: Petitioner, USAir, Inc. has consented; David Rapoport, Rapoport & Kupets Law Offices, has objected on behalf of plaintiffs below; and no other party has responded.

The ATA is a non-profit unincorporated association of federally-certificated air carriers providing scheduled and charter passenger and cargo air transportation. ATA represents the

interests of U.S. airlines[1] that account for more than 95 percent of domestic passenger and cargo traffic. Its principal function is to represent the interests of the U.S. commercial airline industry before the United States Congress, federal agencies, state legislatures, and before federal and state courts. ATA works closely with federal agencies concerned with aviation safety and provides a forum in which airlines can discuss and encourage safety initiatives through industry working groups. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members, including an *amicus* brief in the court below.

In the court below, Petitioners and ATA argued for application of the self-critical analysis privilege to protect from disclosure certain internal airline safety reports. The ATA as *amicus* is uniquely able to describe the significant effect on the airline industry's safety programs if the decision of the court below is allowed to stand. The Court has consistently allowed industry associations, including, *e.g.*, the ATA, to file briefs as *amicus curiae*. *See American Airlines, Inc. v. Wolens*, __ U.S.__, 115 S.Ct. 817 (1995); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994).

Millions of passengers justifiably rely on ATA's member airlines, whose excellent safety record is due in part to internal safety review mechanisms that the self-critical analysis privilege is designed to protect and foster. The self-critical analysis privilege has been applied by many courts, primarily trial courts in

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[1] ATA's members are: Alaska Airlines,Inc.; Aloha Airlines, Inc.; America West Airlines, Inc.; American Airlines, Inc.; American Trans Air, Inc; Continental Airlines, Inc.; Delta Air Lines, Inc.; DHL World Airways, Inc.; Evergreen International Aviation, Inc.; Federal Express Corp.; Hawaiian Airlines, Inc.; Kiwi International Airlines, Inc.; Midwest Express Airlines, Inc.; Northwest Airlines, Inc.; Polar Air Cargo, Inc.; Reeve Aleutian Airways, Inc.; Southwest Airlines Co.; Trans World Airlines, Inc.; United Airlines, Inc.; United Parcel Service Co.; and USAir, Inc. Associate members are: Air Canada; Canadian Airlines International; and KLM-Royal Dutch Airlines.

interlocutory orders addressing discovery disputes. The federal courts of appeals have also recognized the privilege, but have disagreed on its elements and have applied it in an uneven, inconsistent, and unpredictable manner, including the court below. Further, the decision of the court below ignored the criteria set forth in this Court's decision in *Jaffee v. Redmond*, __ U.S. __, 116 S.Ct. 1923 (1996).

The lack of clarity in the federal courts of appeals regarding the scope and application of the privilege has a serious chilling effect on airlines' ability to engage in full and frank internal safety analyses. In ATA's view, not only does Petitioner raise an important question of federal law worthy of this Court's consideration, but the chilling effect of the lower courts' disarray on the scope of the self-critical analysis privilege provides an additional compelling reason for this Court's review.

Accordingly, ATA seeks the Court's permission to file this brief *amicus curiae* to demonstrate that the self-critical analysis privilege is crucial to fostering meaningful internal safety reviews that benefit the travelling public. Failure to recognize and apply the privilege to internal airline safety audits and reviews is contrary to public policy and is inconsistent with Congressional and Federal Aviation Administration policies protecting safety data. Further, failure to so apply the privilege will have a substantial chilling effect on the frankness and completeness of such reviews.

WHEREFORE, ATA respectfully requests leave to file the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does the failure of the court below to follow the criteria set forth in *Jaffee* and *Upjohn* for applying a privilege add to judicial confusion regarding the self-critical analysis privilege and ignore compelling public policies protecting airline safety reviews?

2. Does the public policy of and the public interest in fostering airline safety compel the protection from discovery of internal airline documents analyzing airline operations under the self-critical analysis privilege?

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BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

INTRODUCTION

Public policy has demanded that aviation safety be minutely scrutinized ever since airplanes began carrying passengers. Today, more than ever, aviation safety is on everyone's mind. Despite the fact that the U.S. aviation industry is the safest in the world, and is considerably safer than traveling by automobile[1], aviation safety is a constant topic of public debate. It is also a constant topic of private internal analysis and discussion at U.S. airlines.

Understanding the causes of accidents and other incidents is the primary objective of airlines' internal safety reviews and audits. Only free and frank discussion and investigation of

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[1] According to National Transportation Safety Board ("NTSB") estimates, there were 41,700 highway fatalities in 1995 whereas there were only 177 fatalities in involving U.S. airlines, including commuter airlines. NTSB Comparison of U.S. Transportation Fatalities -Year 1994 vs. Year 1995 (Dec. 31, 1995).

accidents, incidents, trends, and procedures without apprehension about whether such investigations will later become the focus of discovery, can serve the public policy goals expressed in the Transportation Laws. *See* 49 U.S.C. § 40101(a)(1) (mandating safety as the Department of Transportation's highest priority in air commerce); 49 U.S.C. § 44701(c) (requiring the FAA to regulate in a way to reduce or eliminate accidents). The privilege against disclosure of self-critical analysis should be applied to airlines' internal safety reviews in recognition and support of the important legislative and human goal of airline safety.

The U.S. aviation industry's safety record is neither accidental nor routine. Indeed, the industry's safety record is due, in large part, to policies set independently at each airline that require and encourage employees to vigilantly assess day-to-day operational safety for inconsistencies. The ability of airline management to solicit and obtain frank information regarding an airline's operational safety, and suggestions to improve that safety, is the linchpin of the industry's enviable record.[2] Just as there is nothing routine about safety, there is nothing routine about airline internal safety reviews. The airlines' highest management demand not only consistent internal safety investigations but also special investigations into particular matters that may be of concern.

Among federal and state courts that have had to address the self-critical analysis privilege, there is considerable confusion and conflict as to the privilege's scope and application. As this Court stated in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981):

> An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

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[2] Aircraft manufacturers have similar quality assurance and review programs that solicit safety-related suggestions.

In light of this Court's ruling only last term in *Jaffee, v. Redmond*, __U.S.__, 116 S.Ct. 1923 (1996), this observation is particularly apropos. The failure of the court below to follow the rationale articulated in *Jaffee* infects this issue with the uncertainty condemned in *Upjohn* and jeopardizes the ability of airlines to maintain and improve airline safety.

The Court should not allow the present state of disarray to continue. The parameters of the self-critical analysis privilege, over which state and federal courts disagree, presents a compelling issue which this Court should settle under FED. R. EVID. 501. This issue is especially compelling because of the importance of this privilege to promoting practices and procedures in the U.S. airline industry intended to maintain and improve safety. The prevailing confusion and conflict is inconsistent with the kind of candid, thorough, and systematic safety reviews necessary to ensure that air carriers satisfy their "duty . . . to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A).

The first part of this brief discusses the failure of the court below to follow *Jaffee*, the courts' confusion about the scope and application of the self-critical analysis privilege, and the history of the privilege. The second and third parts discuss the applicability of the privilege in the aviation context and the statutory and regulatory support for the privilege, respectively.

INTEREST OF *AMICUS CURIAE*

The ATA is a non-profit unincorporated association of federally-certificated air carriers providing scheduled and charter passenger and cargo air transportation. ATA represents the interests of U.S. airlines[3] that account for more than 95 percent of domestic passenger and cargo traffic. Its principal function is to represent the interests of the U.S. commercial airline industry before the United States Congress, federal agencies, state legislatures, and before federal and state courts. ATA works closely with federal agencies concerned with aviation safety and provides a forum in which airlines can discuss and encourage safety initiatives through industry working groups. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members, including an *amicus* brief in the court below.

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[3] ATA's members are: Alaska Airlines,Inc.; Aloha Airlines, Inc.; America West Airlines, Inc.; American Airlines, Inc.; American Trans Air, Inc; Continental Airlines, Inc.; Delta Air Lines, Inc.; DHL World Airways, Inc.; Evergreen International Aviation, Inc.; Federal Express Corp.; Hawaiian Airlines, Inc.; Kiwi International Airlines, Inc.; Midwest Express Airlines, Inc.; Northwest Airlines, Inc.; Polar Air Cargo, Inc.; Reeve Aleutian Airways, Inc.; Southwest Airlines Co.; Trans World Airlines, Inc.; United Airlines, Inc.; United Parcel Service Co.; and USAir, Inc. Associate members are: Air Canada; Canadian Airlines International; and KLM-Royal Dutch Airlines.

ARGUMENT

I. THE COURT BELOW FAILED TO FOLLOW PRINCIPLES RECENTLY SET FORTH BY THIS COURT, ADDED TO JUDICIAL CONFUSION, AND FAILED TO RECOGNIZE STATUTORY PUBLIC POLICY GOALS

A. The Court Below Failed to Follow This Court's Decision in *Jaffee* in Applying the Self-Critical Analysis Privilege

Only last term, in *Jaffee v. Redmond*, __U.S.__, 116 S.Ct. 1923 (1996), this Court recognized the existence of a new psychotherapist-patient privilege under FED. R. EVID. 501 and reaffirmed that Congressional intent in drafting Rule 501 was for the "federal courts to 'continue the evolutionary development of testimonial privileges'". *Id.* at __, 116 S.Ct. at 1928 (citations omitted).[4] This Court looked to several factors in deciding that

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[4] *Jaffee* was brought under federal question jurisdiction and hence federal common law applied to the privilege under FED. R. EVID. 501. In the instant litigation, federal jurisdiction arose initially out of diversity, although USAir has consistently raised federal preemption as an affirmative defense. While the general rule would be to apply state privilege in diversity cases, "where state and federal issues are commingled . . . [c]ourts that have confronted this issue in the context of the discoverability of evidence have uniformly held that the federal law of privilege governs even where the evidence sought might be relevant to a pendant state claim." 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 501.1, at 511 n.8 (4th ed. 1996). Hence, as in *Jaffee*, this Court can and should address the federal common law privilege of self-critical analysis under Rule 501.

Because of the confusion about the parameters of the self-critical analysis privilege, federal courts, including the district court below, have looked beyond their own jurisprudence for a clear doctrinal rule. *See* Order of Judge Anderson, Oct 25, 1995, *In re Air Crash at Charlotte North Carolina on July 2, 1994* (M.D.L. No. 1041) at 4-5 (Appendix A to USAir's Petition) (looking to a number of federal appellate and district court decisions rather than North Carolina or South Carolina state law for jurisprudential guidance in applying the self-critical analysis privilege); *Siskonen v. Stanadyne, Inc.*, 124 F.R.D. 610, 611-12 (W.D.

the privilege described in *Jaffee* "'promotes sufficiently important interests to outweigh the need for probative evidence . . .'" *Id.* (citations omitted). Among the factors that counselled for recognition of the new privilege was that psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* That rationale is consistent with *Upjohn*, where the Court recognized the "Hobson's choice" facing corporate counsel absent a privilege.[5]

The *Jaffee* test for the recognition of a privilege is four-fold: (1) The communication must "depend upon an atmosphere of confidence and trust . . . to make a frank and complete disclosure of facts . . ." *Jaffee*, __U.S. at __, 116 S.Ct. at 1928; (2) The privilege must serve a public interest such as the "transcendent public good" of mental or physical health of the citizenry. *Id.* at __, 116 S.Ct. at 1929; (3) The public benefits of non-disclosure must outweigh the evidentiary benefit of disclosure so that important communications will not be chilled; and (4) The general support of such privilege in the legislative and judicial communities.

Mich. 1989) (looking to federal jurisprudence in diversity case absent precedent under Michigan law).

[5] *Upjohn*, 449 U.S. at 391. *See also* Robert J. Busch, Comment, *Stimulating Corporate Self-Regulation – The Corporate Self-Evaluative Priviledge: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U.L. REV. 597, 599-600 (1993) [hereinafter Busch, Comment] (noting that corporations are faced with "discordant stimuli" with regulators and consumers calling for "aggressive self-policing" but with "perverse" countervailing incentives that chill such efforts).

Airlines' internal safety audits and investigations meet all of the criteria for application of the self-critical analysis privilege.[6]

1. Airlines, because they depend so heavily upon the actions of many individual employees for safe operations, must create an "atmosphere of confidence and trust" in order to obtain "frank and complete disclosure of facts" to maintain operational safety and avoid accidents. Airline employees, whether they are investigating an accident, a routine operational procedure, or being interviewed about areas of safety that have attracted the interest of airline management, must be free of the fear that their words and thoughts will be used against the company or themselves in litigation at a later date. Without the privilege, both investigators and interviewees cannot be expected to commit to paper "minor" problems or deficiencies before they become "major" ones, thus depriving airline managements of vital safety-related information and the opportunity to address potential safety issues early and efficiently. Not having this kind of information flow available has been referred to as a "dual chilling effect" because not only does disclosure discourage airlines and their safety personnel from investigating and documenting discrepancies, but also because individual employees may be less willing to come forward with candid information. *See* Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1091-93 (1983) ("Harvard Note"). The same dilemma led the Court to reject the "control group test" of privilege in *Upjohn*.

2. Maintaining and improving aviation safety is clearly a "transcendent public good."

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[6] The ultimate balancing of interests for applying self-critical analysis in the context of aviation safety is closely analogous to the balancing of interests with respect to the psychotherapist privilege in *Jaffee*. This interpretation would in no way be inconsistent with *University of Pa. v. EEOC*, 493 U.S. 182 (1990), where the crux of the Court's decision not to recognize a new privilege protecting academic peer review was based on the fact that the public benefit of creating such a privilege was outweighed by the "great, if not compelling, governmental interest" in "ferreting out" invidious discrimination. *Id.* at 193.

3. In the context of aviation accident litigation, the only reason to discover self-critical analysis is the pursuit of punitive damages because liability is not generally an issue. Punitive damages have never been sustained in such a context. The value of producing such self-critical documents, even assuming they show procedural anomalies, is minimal in comparison with the chilling effect on airline employees discussed above. In *Upjohn*, the Court allayed concerns about burdening discovery by distinguishing between actual facts an employee would have to disclose and the privileged communications. *Upjohn*, 449 U.S. at 395-96. Similarly, the self-critical analysis privilege does not hinder discovery of particular facts or access to individuals but protects those documents or meetings relating to safety evaluation and potential areas for change to procedures. *See Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 521-22 (E.D. Tenn. 1977) (strictly limiting scope of questioning regarding aircraft manufacturer's list of problem products and prohibiting any discovery relating to meetings designed to "review, analyze, and evaluate operation for continued self-improvement" of products).

4. While application of the self-critical analysis privilege to airline safety audits and investigations is apparently an issue of first impression, both the courts and federal and state legislatures have supported the privilege in analogous safety fields. *See, e.g., ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199-200 (6th Cir. 1986); *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 131-33 (5th Cir. 1968). In addition, virtually every state has adopted the privilege for "medical review boards", another "public safety" area. *See* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5431, 428-442 (Supp. 1996) (summarizing the statutory "medical review" privileges state by state). These privileges are largely synonymous with and have the same origin as the self-critical analysis privilege. *See Bredice v.*

Doctors Hospital Inc., 50 F.R.D. 249, 250-51 (D.C. Cir. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C.Cir. 1973).[7]

By failing to apply the standards enunciated in *Jaffee* to this case, the court below also failed to follow this Court's clear intent to shield documents meeting the criteria set forth in *Jaffee*.

B. The Failure of the Court Below to Follow *Jaffee* Adds to the Confusion in the Lower Courts About the Scope and Application of the Self-Critical Analysis Privilege

The tests enunciated by various circuits and by numerous district courts has led to a patchwork of rules ill-defining the scope and application of the self-critical analysis privilege. As a result, the courts themselves recognize that they are in disarray.[8]

The federal courts of appeals have either enunciated differing rules of application or declined to rule at all. Thus, in the Fifth Circuit, companies may protect "full and candid evaluations of the cause of accidents . . ." *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 131 (5th Cir. 1968), but in the Ninth Circuit, a similar report may not be shielded *See Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 427 (9th Cir. 1992) ("routine pre-accident

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[7] Support for applying the self-critical analysis privilege in aviation can be found in Federal law regulating air transportation. *See infra* Part III. *Cf. In re United States*, 864 F.2d 1153 (5th Cir. 1989) (granting mandamus to protect from disclosure medical quality assurance records in accordance with 10 U.S.C. § 1102); 38 U.S.C. § 5705(a) (codifying the protected status of quality assurance programs within the Veteran's Administration hospital system).

[8] *See In re Grand Jury Proceedings*, 861 F. Supp. 386, 387 (D. Md. 1994) (noting that "[t]he Supreme Court and the circuit courts have neither definitively denied the existence of [the self-critical analysis] . . . privilege, nor accepted it and defined its scope"); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 305 (N.D. Ill. 1993) (remarking on "inconsistencies in the district court opinions and the Supreme Courts' failure to [explicitly] recognize the [self-critical analysis] privilege . . ."); Busch, Comment, *supra*, at 607-12 (discussing the inconsistent application of the privilege).

safety reviews are not protected . . ."). In the D.C. Circuit, the privilege may be applied in cases involving public health or safety, *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 467 n.1 (D.C. Cir. 1994) (noting that the self-critical analysis privilege "has been found only in limited cases involving areas of public health . . . or public safety"); whereas the Sixth Circuit focused on the requestor. *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) (holding that the self-evaluative privilege does not apply where documents are sought by or subpoenaed by government agencies); and the Fourth Circuit in one case focused on whether the reports were prepared for "internal use" only. *See Reynolds Metals Co. v. Rumsfield*, 564 F.2d 663, 667 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978).

The *Dowling* case, the latest circuit court decision to address the self-critical analysis privilege in depth, adopted a three-prong test enunciated in a 1983 Harvard Law Review article,[9] but also considered the voluntary or involuntary nature of disclosures, the intended use of the documents, and whether the documents were generated prior to or following an accident. *Dowling*, 971 F.2d at 425-27. Even in *Dowling*, however, the court wavered about whether it was fair to mandate production of documents the litigant was required by the government to prepare. *Id.* at 426-27.

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[9] Harvard Note, *supra*, at 1086 (drawing these three criteria from then-existing case law). The three prongs are:

> First, the information must result from a critical self-analysis undertaken by the party seeking protection; Second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

Id. *See also Brem v. Decarlo*, 162 F.R.D. 94, 101 (D. Md. 1995); *Etienne v. Mitre Corp.*, 146 F.R.D. 145, 147 (E.D. Va. 1993); *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987) (under state law privilege). *See also Warren v. Legg Mason Wood Walker, Inc.*, 896 F. Supp. 540, 541 (E.D.N.C. 1995) (stating similar criteria to the test enunciated in *Brem*).

Other courts have added to, modified, or ignored the three prong self-critical analysis test discussed above, focusing *inter alia* on: (1) distinctions between subjective and objective factual information in documents sought to be protected[10]; (2) finding post-accident investigations warrant more protection than pre-accident safety reviews[11]; (3) the voluntary or involuntary nature of disclosure to the government[12]; (4) whether the government is the party seeking the information;[13] and the type of data sought to be protected.[14]

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[10] *See O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965).

[11] *See United States ex rel Falsetti v. Southern Bell Tel. & Tel. Co.*, 915 F. Supp. 308 (N.D. Fla. 1996) (distinguishing *Dowling* where a pre-accident safety review was not within the privilege from *Reichold Chem., Inc. v. Textron*, 157 F.R.D. 522 (N.D. Fla. 1994) where a retrospective self-assessment of environmental damage was privileged). In the aviation context, the notion that pre-accident evaluations are not as protected as post-accident evaluations is equivalent to saying airlines should not attempt to improve safety before an accident.

[12] *Compare Dowling*, 971 F.2d at 426-27 (noting "It may be unfair for a court to require a party to turn over to an opposing litigant self-damning assessments that the government has required it to prepare.") *with Etienne v. Mitre Corp.* 146 F.R.D. 145, 148 (E.D. Va. 1993) ("Because such reports and studies are produced involuntarily, there is no reasonable expectation . . . that such material will remain confidential."). *Cf.* FAA Advisory Circular (AC) 120-56 (Appendix D to USAir's Petition) (exempting records voluntarily submitted to the FAA from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)). *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996) (holding that internal adverse impact analysis studies voluntarily turned over to the EEOC at EEOC's request could not be disclosed by the EEOC).

[13] *See, e.g., FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) (holding that the self-evaluative privilege does not apply where documents are sought by or subpoenaed by government agencies); *In re Grand Jury Proceedings*, 861 F. Supp. 386, 388 (D. Md. 1994).

[14] *See ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199 (6th Cir. 1986) (protecting internal safety analysis containing opinions and recommendations but not pictures taken following accident); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D.

The court below has added to this confusion by concluding that the trial court did not abuse its discretion and by failing to give the trial court clear instructions to protect the disputed documents.

C. Protection of Airline Internal Safety Investigations from Disclosure is a Matter of Compelling Public Policy

The genesis of the self-critical analysis privilege lies in the areas of health and safety. Although *Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973), holding that "self analysis" by a medical review committee was privileged, is often considered the first enunciation of the self-critical analysis privilege, that case was predated by cases holding that documents prepared during accident investigations were privileged. *See Southern Ry. Co. v. Lanham*, 403 F.2d 119, 131 (5th Cir. 1968) (prohibiting discovery of portions of post-accident reports prepared by claims agents for the railroad, because: "[F]ear of discovery might deter [the railroad] from seeking full and candid evaluations of the cause of accidents and the proper disposition of claims"); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965); *Richards v. Maine Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957).

Since the 1970s, courts have found that the underlying balance of interests has weighed in favor of the self-critical analysis privilege where the information sought to be protected deals with health or safety issues. *See ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199-200 (6th Cir. 1986) (holding privileged a "self-critical report" prepared by company after mining accident); *Reichhold Chem., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 526 (N.D. Fla. 1994) ("[t]he public interest in allowing individuals and corporations to candidly assess their compliance with

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518, 521-22 (E.D. Tenn. 1977) (differentiating between lists identifying problem products to which limited protection applied and actual minutes or records of internal safety meeeting that were fully privileged).

environmental regulations 'promotes sufficiently important interests to outweigh' the interest of opposing private litigants . . ."); *Bradley v. Melroe Co.*, 141 F.R.D. 1, 3 (D.D.C. 1992) ("[I]t is not realistic to expect candid expressions of opinion or suggested changes in policies, procedures, or processes knowing that such statements or suggestions may very well be used against colleagues and employees in subsequent litigation."); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 520-22 (E.D. Tenn. 1977) (prohibiting discovery related to self-improvement meetings held by aircraft manufacturer). In the health field, protection of medical review boards is well-recognized and has been codified in virtually every state. *Reichold*, 157 F.R.D. at 525.

The scope and application of the self-critical analysis privilege has raised debate in academic writings, with many commenters calling for clear guidance.[15] Further, the self-critical analysis privilege has been applied in many areas outside health and safety where the policy justifications for the privilege are considerably different. *See Banks v. Lockheed Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (employment discrimination); *In re Crazy Eddie Security Litigation*, 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992) (internal reviews of accounting procedures); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977) (academic peer review).

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[15] *See* Paul B. Taylor, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis When Punitive Damages are Sought*, 16 HARV. J.L. & PUB. POL'Y, 769 (1993); Busch, Comment, *supra*; John F.X. Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 SEC. REG. L.J. 229 (1990); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113 (1988); Harvard Note, *supra*; *see also* William B. Johnson, *Annotation, Discoverability of Traffic Accident Reports and Derivative Information*, 84 A.L.R.4th 15, § 13 (1987) (discussing application of the self-critical analysis privilege to traffic accident reports).

As discussed in Part III, none of these latter applications is the product of a more compelling public policy than airline safety.[16]

II. AIRLINE INTERNAL SAFETY INVESTIGATIONS CLEARLY FALL WITHIN THE SCOPE OF THE SELF-CRITICAL ANALYSIS PRIVILEGE

The rationale for the application of the self-critical analysis privilege is strongest in the health and safety fields, including aviation safety. Self-critical analysis by airlines meets all of the criteria usually enunciated by the courts, including this Court in *Jaffee*.

A. Airline Internal Safety Investigations Are Conducted to Improve Airline Procedures and Products

Notwithstanding comprehensive safety oversight by the FAA, airlines are, of course, primarily responsible for aviation safety. Airlines use internal audits, reviews, and investigations, among various other means, to continuously improve not only the safety of individuals within the system but also the system itself, in addition to being encouraged by the highest levels of government, internal reviews and analyses are a function demanded by the highest levels of airline management to identify anomalies within the system. Self-critical analysis is sometimes performed by internal airline auditors and, sometimes, by outside consultants, but its objective is always the same: improved safety for the travelling public.

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[16] There is possibly one other industry that is as highly regulated as aviation - the nuclear power industry. The comprehensive regulatory schemes mandated by Congress for both of these industries is the result of Congress's concern for public health and safety. *Cf. Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (holding that information generated as part of a voluntary safety information sharing system and voluntarily disclosed to the Nuclear Regulatory Commission ("NRC") could not be disclosed by the NRC to third parties).

B. Airline Internal Safety Investigations are Intended to Remain Confidential to Preserve the Free Flow of Ideas

Because of the sensitivity of the information developed by internal safety investigations, airlines do not expect the results of their safety reviews to be published. Rather, the information, analysis, and recommendations developed during such reviews are used to improve an airline's safety performance, usually under the direction of a company-wide safety officer who reports directly to the company's president or chief executive officer. As noted below, even when an airline uncovers suspected violations of the FAA's regulations and communicates its findings to the FAA, the FAA considers the communication to be confidential information that cannot be disclosed under the Freedom of Information Act.[17]

C. Permitting Discovery of Airline Internal Safety Investigations Will Significantly Curtail the Flow of Information and Will Diminish Their Value

There is significant value in having the results of internal safety reviews in writing. Airlines are large organizations and formal communication of these analyses is essential if they are to be effective. Moreover, future generations of airline management need to be able to learn from their predecessors. However, if reports of airline internal audits and investigations were to be divulged in the context of law suits, where otherwise constructive ideas and recommendations may assume the aspect of hobgoblins coming back to haunt the airline, frank discussion of observations and incisive analysis of safety matters would come to a virtual end, at least in writing, much to the detriment of airline programs intended to improve safety.

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[17] *See* FAA Advisory Circular (AC) 120-56 (Appendix D to USAir's Petition) (exempting records voluntarily submitted to the FAA from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)).

The issue before the Court should not be confused with questions of liability or the availability of monetary awards in aviation accidents. Airlines already have strong incentives, including (but certainly not limited to) judicially-awarded damages and the potential of FAA certificate action and penalty proceedings, to conduct the safest possible operations. When put in the context of the airline industry, withholding self-critical documents, whether generated by the airline or by an outside consultant, is not an attempt to deprive plaintiffs of information, but rather an attempt to further overriding statutory and public policy goals that should and must supersede individual goals. Forcing disclosure of internal safety documents will hinder, not advance, that public policy goal and, ultimately, the safety of the air transportation system.

This Court should recognize that compelling public policy considerations dictate that such information should not be disclosed in this litigation, especially since the factual data underlying an airline's analysis can be obtained elsewhere, can be analyzed by plaintiffs' experts, and can form the basis of those experts' opinions.

III. BOTH CONGRESS AND THE FAA INTENDED TO INSULATE SAFETY-RELATED INFORMATION FROM LITIGATION

A. Congress Mandated the Protection of Aviation Safety-Related Information

Airline safety is one of the most heavily-regulated endeavors in the nation. The Department of Transportation (DOT) is directed by statute to consider "maintaining safety as the highest priority in air commerce" even when addressing economic decisions, 49 U.S.C. § 40101(a)(1). The FAA, the agency with primary jurisdiction over airline safety, is obliged to regulate airlines "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. § 44701(c). And, as noted above, airlines have a *duty* to operate

with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d).

A clear example in aviation that the lack of protection chills free and frank discussion of safety issues arises in the context of the reluctance of airlines to share information relating to past performance of pilots with other airlines.[18] As a result, Congress is considering several bills, such as H.R. 3536, 104th Cong. 2d. Sess. (1996), the "Airline Pilot Hiring and Safety Act," and Title VII of the "Federal Aviation Administration Authorization Act of 1996," S.1994, 104th Cong. 2d. Sess. (1996), to discourage suits and encourage sharing of pilot information between airlines.

Similarly, in establishing the NTSB, the independent agency charged with investigating aviation tragedies such as the one that is the subject of this litigation, the Congress anticipated that litigants might wish to use the NTSB's analysis, findings, and recommendations for purposes that were not safety-related. Accordingly, the Congress provided that:

> No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence *or used* in a civil action for damages resulting from a matter mentioned in the report.

49 U.S.C. § 1154(b) (emphasis added). There are even more stringent restrictions on the discovery and use of cockpit voice recorder tapes and transcripts in litigation. *See* 49 U.S.C. § 1154(a). The House of Representatives recently passed H.R. 3159, 104th Cong. 2d. Sess. (1996), that would prohibit any agency from disclosing safety-related information voluntarily submitted to the NTSB in order to specifically encourage sharing of safety data by airlines. *See National Transportation Safety*

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[18] Following a 1994 accident, the NTSB recommended that the FAA require airlines to share pilot training and performance information, with due consideration to privacy concerns.

Board Reauthorization: Joint Hearings before the Subcomm. on Aviation, Subcomm. on Railroads of the House Comm. on Trans. and Infrastructure, 104th Cong., 2d. Sess. 39, 50 (1996) (Statement of Jim Hall, Chairman NTSB) ("This proposed amendment would cure private sector concern and permit agency access to information not now readily available to it.")

Although Congress left the specifics of aviation safety oversight to the FAA, Congressional policy is clear, consistent, and contrary to the use of safety-related investigative materials in litigation arising out of aviation accidents. This Court should do no less.

B. The FAA Strongly Encourages Internal Safety Audits and Reviews

Government regulators cannot monitor every flight or look over every employee's shoulder, a fact that is recognized both by the FAA and the airlines. For example, with FAA support the aviation industry is planning to share safety data with a test-bed Flight Operations Quality Assurance program. As the Chairman of the Flight Safety Foundation states:

> We believe strongly that nonpunitive safety-data programs are excellent accident-prevention tools . . . . But we must assure the industry that these data will remain confidential and will not be used in legal actions, and that individual privacy will be protected. . . . . Confidentiality, data security and the potential for punitive and legal actions are among the industry's top concerns in establishing a widespread data exchange.

Flight Safety Foundation, News, *FSF Chairs Aviation Industry Data-sharing Task Force*, Feb. 13, 1996.

The FAA, in proposing to implement a Global Analysis and Information Network (GAIN) to encourage sharing of safety data has also recognized the need for "adequate safeguards . . . to

protect the security and confidentiality concerns of the information providers . . . ." A Call for the Development of Prototype(s) for a Global Analysis and Information Network (GAIN), 61 Fed. Reg. 21522, 21523-524 (1996). The FAA gives several examples of how effective data-sharing arrangements in other countries solved critical safety problems before accidents occurred.[19]

The FAA encourages airlines to perform internal safety audits and reviews, to improve their safety and systems as a result of their internal findings, and to report any suspected lapses to the FAA without jeopardy of FAA enforcement action, imposition of civil penalties, or disclosure to third parties under the Freedom of Information Act, 5 U.S.C. § 552, because disclosure of such reports would both:

> (1) impair the Government's ability to collect similar information in the future, and (2) cause harm to an "identifiable" governmental interest.

FAA Advisory Circular (AC) 120-56, p. 7. While AC 120-56 applies, by its terms, only to suspected instances in which an airline may not have complied with the FAA's regulations, the principle stated in the Advisory Circular (as well as in a similar Advisory Circular directed to the aviation manufacturing community and in policy statements by the U.S. Secretary of Transportation and the FAA Administrator) is crystal clear: There is an overriding governmental interest in airlines' engaging in internal investigations of their safety performance without the threat of punishment by the FAA or discovery by third parties for use in litigation.

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[19] For example, data analysis found that an airline's pilots were frequently disregarding ground proximity warnings due to a high false alarm rate and led to software fixes to reduce false alarms. *Id.* at 21524. Data analysis also disclosed that a particular type of aircraft was developing cracks due to hard landings where no post-landing inspections were required, leading to mandatory inspections following such landings. *Id.*

Allowing the court below to compel disclosure of airline internal safety analyses is directly contrary to a strong public policy expressed by Congress in adopting the comprehensive aviation safety regulatory scheme of the transportation laws and is directly contrary to the implementation of those laws by the agency designated by Congress to establish such policies. This Court should adopt the good judgment of the federal agency with primary jurisdiction over airline safety, the FAA, and refuse to allow the court below to compel disclosure of the documents sought by plaintiffs.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant USAir's Petition for a Writ of Prohibition.

Respectfully submitted,

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APPENDIX A

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(b) This section does not apply to matters that are -

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * * *

10 U.S.C. § 1102. Confidentiality of medical quality assurance records: qualified immunity for participants

(a) Confidentiality of records. Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).

(b) Prohibition on disclosure and testimony.

(1) No part of any medical quality assurance record described in subsection (a) may be subject to discovery or admitted into evidence in any judicial or administrative proceeding, except as provided in subsection (c).

(2) A person who reviews or creates medical quality assurance records for the Department of Defense or who participates in any proceeding that reviews or creates such records may not be permitted or required to testify in any judicial or administrative proceeding with respect to such records or with respect to any finding, recommendation, evaluation, opinion, or action taken by

such person or body in connection with such records except as provided in this section.

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38 U.S.C. § 5705. Confidentiality of medical quality assurance records

(a) Records and documents created by the Department as part of a medical quality assurance program (other than reports submitted pursuant to section 7311(g) of this title) are confidential and privileged and may not be disclosed to any person or entity except as provided in subsection (b) of this section.

* * * * * *

49 U.S.C. § 1154. Discovery and use of cockpit voice and other material

(a) Transcripts and recordings.

(1) Except as provided by this subsection, a party in a judicial proceeding may not use discovery to obtain -

(A) any part of a cockpit voice recorder transcript that the National Transportation Safety Board has not made available to the public under section 1114(c) of this title; and

(B) a cockpit voice recorder recording.

(2) (A) Except as provided in paragraph (4)(A) of this subsection, a court may allow discovery by a party of a cockpit voice recorder transcript if, after an in camera review of the transcript, the court decides that -

(i) the part of the transcript made available to the public under section 1114(c) of this title does not provide the party with sufficient information for the party to receive a fair trial; and

(ii) discovery of additional parts of the transcript is necessary to provide the party with sufficient information for the party to receive a fair trial.

(B) A court may allow discovery, or require production for an in camera review, of a cockpit voice recorder transcript that the Board has not made available under section 1114(c) of this title only if the cockpit voice recorder recording is not available.

(3) Except as provided in paragraph (4)(A) of this subsection, a court may allow discovery by a party of a cockpit voice recorder recording if, after an in camera review of the recording, the court decides that -

(A) the parts of the transcript made available to the public under section 1114(c) of this title and to the party through discovery under paragraph (2) of this subsection do not provide the party with sufficient information for the party to receive a fair trial; and

(B) discovery of the cockpit voice recorder recording is necessary to provide the party with sufficient information for the party to receive a fair trial.

(4) (A) When a court allows discovery in a judicial proceeding of a part of a cockpit voice recorder transcript not made available to the public under section 1114(c) of this title or a cockpit voice recorder recording, the court shall issue a protective order -

(i) to limit the use of the part of the transcript or the recording to the judicial proceeding; and

(ii) to prohibit dissemination of the part of the transcript or the recording to any person that does not need access to the part of the transcript or the recording for the proceeding.

(B) A court may allow a part of a cockpit voice recorder transcript not made available to the public under section 1114(c) of this title or a cockpit voice recorder recording to be admitted into evidence in a judicial proceeding, only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the recording for purposes other than for the proceeding.

(5) This subsection does not prevent the Board from referring at any time to cockpit voice recorder information in making safety recommendations.

(b) Reports.

No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

49 U.S.C. § 40101. Policy

(a) Economic regulation.--In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

* * * * * *

49 U.S.C. § 44701. General requirements

(c) Reducing and eliminating accidents. The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards. --When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall--

(1) Consider--

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

* * * * * *